

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0681, State of New Hampshire v. Louise M. Staples, the court on January 30, 2008, issued the following order:

The defendant, Louise Staples, appeals her conviction in Coos County Superior Court of two counts of theft by unauthorized taking contrary to RSA 637:3 (2007). She argues that: (1) State's witness Theresa Fortier was unqualified to testify as an expert; (2) the standards and protocols devised by Fortier were not sufficiently reliable to be admitted under RSA 516:29-a (2007) and New Hampshire Rules of Evidence 702; (3) the State presented insufficient evidence to prove her guilt beyond a reasonable doubt; and (4) the trial court's order that she pay \$117,255.38 in restitution to the Town of Carroll was error. We affirm.

The defendant worked as both town Clerk and tax Collector for the Town of Carroll for more than twenty years. She was initially paid by a combination of salary and statutory fees. She received fees for issuing various documents, including motor vehicle registration permits, tax liens, copies of vital records, and license plates and stickers of the department of motor vehicles. In 2000, at an annual town meeting, the town voted to pay her only a salary, with the town receiving the statutory fees.

The defendant was convicted of theft by unauthorized taking. As part of her sentence, she was ordered to pay \$117,255.38 in restitution to the Town of Carroll. We first turn to whether the State's expert was qualified to testify about the thefts.

"[T]he trial court retains the discretion to admit expert testimony and its decision will be reviewed under an unsustainable exercise of discretion standard." Milliken v. Dartmouth-Hitchcock Clinic, 154 N.H. 662, 665 (2006) (citations omitted). "We review the trial court's rulings on admissibility of evidence under an unsustainable exercise of discretion standard. Unless a party establishes that such a ruling was clearly untenable or unreasonable to the prejudice of [the] case, it will not be disturbed." McLaughlin v. Fisher Eng'g, 150 N.H. 195, 197 (2003) (citation and quotation omitted).

The defendant argues that Theresa Fortier was not qualified to testify about the thefts because she did not have adequate experience or training, such as being a certified fraud examiner or certified public accountant. However, "[a]n individual witness's qualifications must be determined on a case-by-case basis,

not by application of a per se rule of exclusion or inclusion.” O’Donnell v. HCA Health Servs. of N.H., 152 N.H. 608, 613 (2005).

Under Rule of Evidence 702, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto. In deciding whether to qualify a witness as an expert, the trial judge must conduct an adequate investigation of the expert’s qualifications. Because the trial judge has the opportunity to hear and observe the witness, the decision whether a witness qualifies as an expert is within the trial judge’s discretion.

Milliken, 154 N.H. at 667 (quotation omitted). We construe Rule 702 liberally. Mankoski v. Briley, 137 N.H. 308, 310 (1993).

Fortier, who has an associate’s degree in accounting, gained most of her accounting and fraud expertise through work experience. She worked as a bank teller and was promoted to a supervisory position in which she became responsible for balancing the bank’s own bank account and ensuring that bank transactions balanced out at the end of each day. She later worked for the Grafton County Probate Court where she administered complex probate estates, trusts, opened administrations and reviewed inventories and looked for possible improprieties, including missing assets. She spent six months working as the sole accountant for an Internet start-up company and was responsible for establishing the company’s accounting system. She also worked as an audit supervisor for the New Hampshire Department of Revenue Administration where she reviewed tax returns and checked for possible improprieties.

Based upon the record, the trial court could have reasonably concluded that she was qualified to give her opinion regarding the defendant’s case. Accordingly, we cannot find that the trial court committed an unsustainable exercise of discretion in permitting Fortier to testify as an expert witness.

Further, we do not find that the trial court committed an unsustainable exercise of discretion in ruling Fortier’s methods sufficiently reliable to be admitted under RSA 516:29-a and Rule 702. RSA 516:29-a provides:

- I. A witness shall not be allowed to offer testimony unless the court finds:
 - (a) Such testimony is based upon sufficient facts or data;
 - (b) Such testimony is the product of reliable principles and methods; and
 - (c) The witness has applied the principles and methods reliably to the facts of the case.

- II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:
- (1) Have been or can be tested;
 - (2) Have been subjected to peer review and publication;
 - (3) Have a known or potential rate of error;
 - (4) Are generally accepted in the appropriate scientific literature.
- (b) In making its findings, the court may consider other factors specific to the proffered testimony.

RSA 516:29-a (2007) (emphasis added).

The defendant argues that Fortier's methodology is unreliable, emphasizing that Fortier adopted her own methodology rather than referencing standards used by forensic accountants, fraud investigators, or other professionals. The defendant also argues that Fortier's methodology was too limited because she assumed that money was missing because a discrepancy existed in the figures. The defendant argues that Fortier should have considered whether the discrepancies were due to bad bookkeeping practices, rather than theft.

The trial court's decision to admit Fortier's methodology was reasonable. Fortier testified that she reviewed approximately twenty boxes of documents from the clerk's office, including receipts, town clerk ledgers, the tax collector accounts receivable registers, bank deposits, cash receipt tickets and various license-related documents. She created a spreadsheet of each document type so that she could compare the ledger entries to copies of checks that had been deposited and to cash receipts. She used these spreadsheets to compare the amounts of cash and checks received to the bank deposits. She also matched ledger entries with corresponding checks and cash receipts, using names, dates, and rough deposit amounts.

In creating the spreadsheets, Fortier relied upon those facts most crucial to determining whether the thefts occurred -- the very documents that catalogued the defendant's handling of town funds. Further, though Fortier's accounting methods may be simple, they are also reliable. She inspected all of the relevant documents and then compiled them, using basic arithmetic. Thus, her methodology met the RSA 516:29-a, I, standards.

We need only consider whether a methodology meets the second set of factors under RSA 516:29-a, II where it is "appropriate to the circumstances." RSA 516:29-a, II. "In cases where the testimony's reliability is properly taken for granted, or where the information before the court is sufficient to reach a reliability determination, the trial court need not and should not conduct an evidentiary hearing." State v. Pelletier, 149 N.H. 243, 252 (2003). Here, the trial

court had ample reason to conclude that an evidentiary hearing was unnecessary. Fortier's spreadsheets are simple compilations of information, completed using basic accounting skills.

The defendant argues the trial court erred in denying her motion to dismiss based upon sufficiency of the evidence. "To prevail in a challenge to the sufficiency of the evidence, the defendant bears the burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Crie, 154 N.H. 403, 406 (2007). The State was required to prove three elements of the crime: (1) the defendant obtained or exercised unauthorized control of money belonging to the town; (2) the defendant acted with a purpose to deprive the town of money; and (3) the value of the property taken was over \$1000. RSA 637:3, 11 (2007).

Fortier testified that some checks and cash receipts corresponded exactly with the ledger entries, while others only partially matched and some entries contained no matching deposits. A former town selectman testified that the defendant did not make deposits on a regular basis, even after being urged to do so, because she needed to wait until she could "balance" the accounts properly. Several townspeople testified that the defendant asked them to pay bills in cash, including one bill that totaled \$5,619.62. The defendant's former assistant and two successive town treasurers all testified that the defendant shielded her bookkeeping documents from others.

Further, though the defendant argued at trial that she was authorized by the town to receive DMV "sticker" fees in addition to her salary and that her practice of doing so caused some of the bookkeeping discrepancies, the defendant does not argue that this practice explains all of the discrepancies. Even assuming that the defendant took the fees legally, there is no dispute that the other bookkeeping discrepancies, in both the Town Clerk and Town Tax Collector ledgers, are greater than one thousand dollars each. We therefore conclude that the evidence was sufficient to sustain the convictions.

Additionally, the defendant argues that the trial court's order of restitution was erroneous because the State failed to prove by a preponderance of the evidence that such a large amount was stolen. We disagree.

"Determining the appropriate restitution amount is within the discretion of the trial court." State v. Enq, 143 N.H. 465, 470 (1999). We accept the trial court's factual findings unless they lack support in the record or are clearly erroneous. State v. Shannon, 155 N.H. 135, 140 (2007). "If the factual basis for restitution is disputed . . . the State must prove by a preponderance of the evidence that the loss or damage is causally connected to the offense and bears a significant relationship to the offense." Enq, 143 N.H. at 470 (quotation omitted).

The defendant does not dispute the causal connection, but rather, disputes the amount that was stolen and should ultimately be owed in a restitution award.

The trial court's restitution award is not an unsustainable exercise of discretion. At the restitution hearing, the State relied upon Fortier's analysis and worksheets, including her analysis that \$117,255.38 was a conservative estimate of the money stolen and the defendant relied upon her expert's testimony critiquing Fortier's methodology. Given the evidence, it was reasonable for the trial court to conclude that Fortier's testimony was more credible than that of the defense expert and that "\$117,255.38 represents the minimum amount that the defendant misappropriated from the Town of Carroll," as Fortier opined.

Further, the trial court could have concluded based upon a preponderance of the evidence, that the defendant took the DMV "sticker" fees without authorization. The defendant took these fees without disclosing it in the ledgers and without discussing it at the town meeting. Though a few town officials may have been aware that she took the fees, there is no evidence that all of the town officials agreed with the practice or that the citizens of Carroll understood that she would keep these particular fees after the town voted to retain all other fees.

Given the record, the trial court could have concluded that the State proved by a preponderance of the evidence that Fortier's estimate of the money stolen is correct.

Affirmed.

DALIANIS, GALWAY, and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**